

# **EXHIBIT 2**

**REBUTTAL REPORT OF MATTHEW G. EZELL**

I, Matthew G. Ezell, declare as follows:

**INTRODUCTION**

1. I am president of the marketing research and consulting firm of Ford Bubala & Associates, located in Huntington Beach, California, which has been engaged in commercial marketing research and consulting for the past forty-three years. My professional experience is further summarized below in paragraphs 18 through 24.

2. In the instant matter, at the request of Davis Wright Tremaine LLP, counsel for Plaintiff/Counterclaim Defendants, Steven Madden, Ltd., I was asked to review the expert report of Robert Burke relative to the alleged secondary meaning<sup>1</sup> of the Cult Gaia Ark Bag trade dress.

3. Mr. Burke opines in his expert report that the [REDACTED]

[REDACTED] Despite this statement, Mr. Burke does not provide, in his expert report, any empirical data to support this proposition among consumers. Instead, he relies on his years of experience in the industry, his personal relationship with industry leaders, a listing of retailers that carry the Ark Bag, eight examples of promotional rhetoric relative to the Ark Bag, and what appears to be limited data regarding the volume of Ark Bag sales to retailers. While potentially relevant to his expertise in the industry, none of these factors provide any evidence of whether a mental association exists in buyers' minds with respect to the Cult Gaia Ark Bag and a single source of the product.

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<sup>1</sup> Secondary meaning is defined as "a mental association in buyers' minds between the alleged mark and a single source of the product." See J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, Vol. 2, §15:15 @ 15-15, Rel. 6, 3/2019.

4. In response to the allegations set forth by Mr. Burke, I designed and caused to be conducted a survey to address the issue of the secondary meaning or acquired distinctiveness with respect to the appearance of Defendant's/Counterclaim Plaintiff's Cult Gaia Ark Bag. Specifically, this survey was designed to measure the level or degree, if any, to which the appearance of the Cult Gaia Ark Bag is associated in buyers' minds with Cult Gaia or a sole yet anonymous source. The results of the survey conducted by Ford Bubala & Associates indicates that consumers have not come to associate the appearance of the Cult Gaia Ark Bag with Cult Gaia or a sole anonymous source. In fact, the survey evidences that only approximately one and one-half percent (1.49%) of the qualified respondents<sup>2</sup> associate the appearance of the Cult Gaia Ark Bag with Cult Gaia or a sole anonymous source. Based on existing case law, this level of association is insufficient to provide evidence of secondary meaning.<sup>3</sup>

5. It is my opinion that the results of the survey conducted in this matter support a finding that the appearance of the Cult Gaia Ark Bag does not have secondary meaning or acquired distinctiveness among the relevant universe of past and/or potential purchasers of the class of goods.

#### SURVEY BACKGROUND

6. Attached hereto as Exhibit A are the results of the survey which addressed the issue of secondary meaning or acquired distinctiveness with respect to the appearance of the Cult Gaia Ark Bag. The Appendix of Exhibit A contains other survey-related background materials.

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<sup>2</sup> Qualified respondents were females 18 years of age or older residing in the U.S. and who either purchased in the past year, or were likely in the next year to purchase a handbag costing approximately \$100 or more.

<sup>3</sup> See McCarthy § 32:190, Rel. 3, 6/2018. ("Generally, figures of 50% are regarded as

7. The sample selection, questions, questionnaire design, and interviewing procedures employed in the survey were designed in accordance with the generally accepted standards and procedures in the field of surveys. The survey was also designed to meet the criteria for survey trustworthiness detailed in the Federal Judicial Center's Manual for Complex Litigation, Fourth.<sup>4</sup>

8. I was responsible for the design of the survey, the screener and questionnaire, as well as for the procedures to be followed in conducting the interviews. Data gathering was carried out, under the direction of Ford Bubala & Associates, by Issues & Answers Network, Inc. ("Issues & Answers"), an independent survey organization. Data gathering was conducted from May 28 through May 30, 2019. In total, two hundred two (202) interviews were completed in this survey.

9. The survey conducted in this matter was administered under a double-blind protocol. Specifically, not only were the respondents not informed as to the purpose or sponsor of the survey, but similarly, both the staff of Gazelle Global, the sample provider, and the staff of Issues & Answers were not informed as to the purpose or sponsor of the survey.

#### SURVEY STRUCTURE

10. This survey conducted in this matter employed an online internet protocol using an internet panel created and maintained by Gazelle Global and was executed by Issues &

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clearly sufficient [to establish secondary meaning].")

<sup>4</sup> For the proffered poll or survey, "...Relevant factors include whether: the population was properly chosen and defined; the sample chosen was representative of that population; the data gathered were accurately reported; and the data were analyzed in accordance with accepted statistical principles...In addition, in assessing the validity of a survey, the judge should take into account the following factors: whether the questions asked were clear and not leading; whether the survey was conducted by qualified persons following proper interview procedures; and whether the process was conducted so as to ensure objectivity..." See Federal Judicial Center, Manual for Complex Litigation, Fourth, Section 11.493, @ 102-104 (2004).

Answers. Potential respondents were invited to fill out the screening portion of the interview to determine whether or not they met the universe definition. Subsequently, those potential respondents who met the universe definition were invited to complete the main survey.

11. The relevant universe consisted of females 18 years of age or older who reside in the United States and who either had purchased in the past year or were likely to purchase in the next year a handbag costing approximately \$100 or more.<sup>5</sup>

12. The respondent selection procedure employed in this survey is referred to as a quota sampling method.<sup>6</sup> This method provided a respondent base that is generally representative of the age and geographic distribution of females eighteen (18) years of age or older who reported that in the past year they were likely to purchase a handbag costing approximately \$100 or more. This age and geographic distribution was based upon a kNOW omnibus survey conducted May 23-24, 2019, among a nationally representative sample of five hundred (500) females across the United States.<sup>7</sup>

13. The secondary meaning survey conducted in this matter was designed to employ a scientific experimental survey design consisting of two survey cells: (1) a test or

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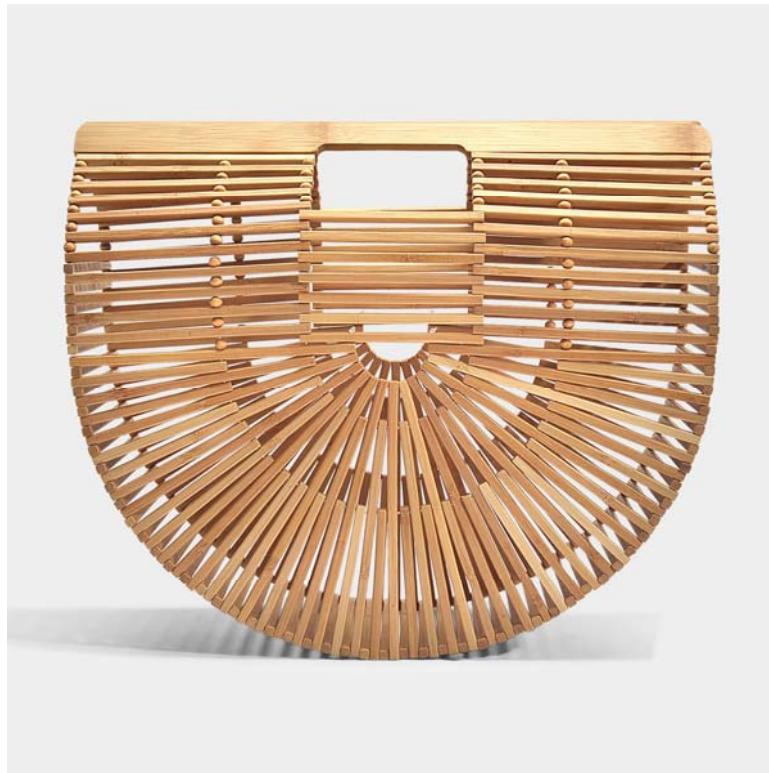
<sup>5</sup> Additionally, the survey universe was also restricted to respondents: (1) whose age matched pre-existing data from panel provider; (2) who were using a desktop computer, a laptop/notebook computer, or a tablet to read and answer the survey questions; (3) who agreed to answer the questions in the survey by themselves without the help or assistance of anyone else and without seeking information from any other source (e.g., internet search); (4) who, if they wore contact lenses or eyeglasses when using the device they were using, would wear them during the questionnaire; (5) who selected the appropriate number from a list of four numbers, demonstrating comprehension of survey instructions; and (6) who reported they could clearly see the handbag in the survey exhibit photograph.

<sup>6</sup> Quota sampling is a method that uses known information about panel members (e.g., age, gender, geographic location, etc.) to generate demographically applicable samples.

<sup>7</sup> Respondents in the kNOW omnibus survey were asked "In the past year, have you purchased a handbag costing approximately \$100 or more?" Based on the age and geographic location of respondents who answered yes to this omnibus survey, quotas for the Ford Bubala survey were established as follows: approximately 32% 18 to 34, 47% 35 to 54, and 21% 55 or over; and approximately 19% from the Northeast, 20% from the Midwest, 38% from the South,

experimental survey cell designed to measure the association, if any, with respect to the appearance of the Cult Gaia Ark Bag; and (2) a control survey cell designed to measure the extent of mismeasurement in the test cell survey results. As there was *de minimis* association, the control cell was not executed.

14. Survey respondents in the test cell saw a photograph of the Cult Gaia Ark Bag as depicted in reduced size below. See Exhibit A, page 2.



#### SURVEY PROCEDURES AND QUESTIONS<sup>8</sup>

15. In this survey respondents who met the screening criteria (i.e., the universe definition), were then shown the following statements:

In this survey, you are going to be shown a survey exhibit and then asked a couple of questions.

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and 23% from the West.

<sup>8</sup> For the full screener and questionnaire, see Exhibit A, pages 3-8.

Please understand that we are only interested in your opinions or beliefs; and if you don't have an opinion or belief or don't know the answer to a question, that is an acceptable answer.

Subsequently, respondents were instructed to:

Please look at the handbag in this photograph.

Please feel free to take as much time as you like looking at the handbag before moving on to the survey questions.



Subsequently, respondents were asked:

8.0 Now, thinking about handbags...

Do you associate the appearance of this handbag with any particular brand or brands?

Those respondents who answered affirmatively<sup>9</sup> were then asked:

8.1 What brand or brands?

Those respondents who didn't know a brand or brands<sup>10</sup> were then asked:

8.2 Again, thinking about handbags...

Do you associate the appearance of this handbag with one brand or more than one brand?

Finally, respondents were thanked for their time and participation.

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<sup>9</sup> Respondents who answered 'No/don't know' to Q8.0 were not asked any further questions.

SURVEY RESULTS

16. Following is a restatement of the questions posed and a presentation of the survey results.

TABLE 1  
TEST CELL

Q8.0 Do you associate the appearance of this handbag with any particular brand or brands?  
 Q8.1 What brand or brands?  
Q8.2 Do you associate the appearance of this handbag with one brand or more than one brand?

Response Categories	Response Distribution	
	Number	Percent (n=202)
1. Association with Cult Gaia or sole anonymous source		
- Cult Gaia	2	0.99
- Don't know brand - one brand	1	0.50
Subtotal	3	1.49
2. Association with other brand or brands		
- Brand or brands named		
Balenciaga	1	0.50
Banana Republic, Gap	1	0.50
Baskets	1	0.50
Chanel	1	0.50
Coach	1	0.50
Dior	2	0.99
Forever 21	1	0.50
Khol's	1	0.50
Marc Jacobs	1	0.50
Target, Macy's, Nordstrom, Free People	1	0.50
Tommy Bahama	1	0.50
Urban Outfitters, Francesca's, Zara	1	0.50
Urban Outfitters	1	0.50
Wicker	1	0.50
Woof	1	0.50
Yves Saint Laurent	1	0.50
Zara or Mango	1	0.50
No brand mentioned	2	0.99
- Don't know brand or brands		
- more than one brand	1	0.50
Subtotal	21	10.40
3. No association with any brand or brands	178	88.12
Total	202	100.00

<sup>10</sup> Respondents who provided a brand or brands were not asked any further questions.

Approximately one percent (0.99%) of the survey respondents provided a Cult Gaia response and one-half percent (0.50%) of respondents associated the appearance of the handbag with one brand and did not know the name of that brand. Approximately ten percent (10.40%) associated the appearance of the handbag with brand(s) other than Cult Gaia, or with more than one brand, or had no opinion. Finally, approximately eighty-eight percent (88.12%) of the survey respondents did not associate the appearance of the handbag with any brand or brands.

### CONCLUSION

17. It is my considered opinion, based upon my education, background, and professional experience, and my review of and analysis of the survey conducted in this matter that the results of this survey support a finding that the Cult Gaia Ark Handbag does not have secondary meaning or acquired distinctiveness among past and/or potential purchasers of handbags costing approximately \$100 or more.

### QUALIFICATIONS

18. Ford Bubala & Associates has been retained by a variety of firms engaged in the consumer product, industrial product, and service sectors of the economy to provide marketing consulting and research services. Approximately one half of Ford Bubala & Associates' consultancies have involved the design and execution of marketing research surveys.

19. During the past forty-three years, Ford Bubala & Associates has been retained in a number of litigation-related consultancies involving intellectual property matters, including matters before federal and state courts, the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, and the International Trade Commission.

20. I have been with Ford Bubala & Associates for approximately seventeen years. During the past nine years, I have participated in the design and execution of a variety of surveys relating to intellectual property matters, including trademark, false advertising, and other

related matters. Additionally, I am familiar with the tests for trustworthiness of properly conducted surveys or polls and the accepted principles of survey research, detailed in the Manual for Complex Litigation, Fourth.<sup>11</sup>

21. I am a member of the American Marketing Association (AMA), the American Association of Public Opinion Research (AAPOR), the Insights Association,<sup>12</sup> and the International Trademark Association (INTA).

22. Attached hereto as Exhibit B is a copy of publications that I have authored or co-authored in the last ten years.

23. Attached hereto as Exhibit C is a list of all trial and deposition testimony I have given in the last four years.

24. Attached hereto as Exhibit D is a copy of my professional history, describing my qualifications and professional background.

#### MATERIALS CONSIDERED

25. Materials considered in the instant matter include: Memorandum of Law in Support of Plaintiff/Counterclaim Defendant's Motion For Summary Judgment; Expert Report of Robert Burke; Expert Report of Aneta Genova; and the results of an omnibus study conducted May 23-24, 2019.

#### COMPENSATION

26. Ford Bubala & Associates' fees for this engagement consist of billable time and expenses. Standard time is billed at the rate of [REDACTED] for the services of a Principal and [REDACTED] for the services of a Research Associate. Deposition and trial time are billed at the [REDACTED] plus expenses.

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<sup>11</sup> Supra note 4.

<sup>12</sup> The Marketing Research Association (MRA) and the Council of American Survey

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 6th day of June, 2019, in Huntington Beach, California.



Matthew G. Ezell